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No. 80-.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LAY FACULTY ASSOCIATION, LOCAL 1261,

Petitioner,

v.

BISHOP FORD CENTRAL CATHOLIC HIGH SCHOOL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

When this Court decided in National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) that lay faculty in church-operated schools are not covered by the National Labor Relations Act, 29 U.S.C. §151 et seq., did it also intend to exclude lay faculty in private non-church operated secondary schools offering both secular and religious courses of study from National Labor Relations Board jurisdiction?

Parties Before United States Court of Appeals for the Second Circuit

1. National Labor Relations Board - Petitioner.
2. Lay Faculty Association, Local 1261 - Intervenor-Petitioner.
3. Bishop Ford Central Catholic High School - Respondent.

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OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 623 F.2d 818 (2nd Cir. 1980). A copy of the opinion

is appended to this petition as Appendix "A", pp. A-1 through A-15.

The order of the Court of Appeals denying petition for rehearing is appended to this petition as Appendix "B", pp. B-1 through B-4.

The supplemental decision and order of the National Labor Relations Board in this case (Appendix "D", pp. D-1 through D-23), issued upon remand, is officially reported at 243 N.L.R.B. No. 24.

The initial decision and order of the National Labor Relations Board in this case (Appendix "F", pp. F-1 through F-7) is officially reported at 236 N.L.R.B. No. 3.

JURISDICTION

On June 17, 1980, the Court of Appeals entered judgment denying the application

of the National Labor Relations Board for enforcement of its orders dated May 15, 1978 and June 25, 1979. A timely petition for rehearing was filed by the intervenor Lay Faculty Association, Local 1261. On October 2, 1980, the Court of Appeals entered an order denying the petition for rehearing.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the National Labor Relations Act, as amended, 29 U.S.C. §151 et seq., are set forth at Appendix "G."

STATEMENT OF THE CASE

Background

In 1966, the Roman Catholic Diocese of Brooklyn, New York ("Diocese") recognized the petitioner, Lay Faculty Association ("Association"), as the collective bargaining agent for a unit of full-time lay teachers at approximately nine non-profit high schools owned and operated by the Diocese of Brooklyn and located in Brooklyn, Queens and several Long Island communities (F-3, n.2), See Roman Catholic Diocese of Brooklyn, 222 N.L.R.B. 1052, 1059 (1976), enforced in part sub nom. Nazareth Regional High School v. N.L.R.B., 549 F.2d 873 (2d Cir. 1977). Bishop Ford High School ("Bishop Ford"), one of the nine diocesan high schools covered by the 1966 recognition agreement, began a collective bargaining relationship with the Association

in that year.[1/]

In 1972, the Diocese organized the Henry M. Hald Association ("Hald"), an educational corporation, to operate the Diocesan Catholic high schools. Among other duties, Hald acted as bargaining representative of certain of the schools, including Bishop Ford. As the Diocese's designated agent, Hald negotiated a

1/ Factual matters not set forth in the decisions and orders of the National Labor Relations Board, attached hereto as Appendices "D" and "F", are documented in the unreported decision of Administrative Law Judge Frank H. Itkin in Roman Catholic Diocese of Brooklyn, Henry M. Hald Association, Bishop Ford Central Catholic High School and Lay Faculty Association, Local 1261, American Federation of Teachers, AFL-CIO, JD-535-77 (Brooklyn, New York) dated July 28, 1977. The decision appeared in the Appendix which accompanied the Board's petition for enforcement to the Court of Appeals at pages A-22 through A-96. It is not attached hereto because of its length.

series of collective bargaining agreements setting forth the terms and conditions of employment for the lay faculty at Bishop Ford and other Diocesan schools covering the periods 1972-74, 1974-75 and 1975-77 (D-5; F-3).

In March 1975, Hald began negotiations with the Association for a new collective bargaining agreement covering the lay faculty at the five remaining diocesan high schools. Bargaining did not proceed smoothly and the parties were unable to reach agreement before the expiration of the 1973-75 contract. A five week strike ensued. On or about October 8, 1975, the parties settled their dispute and reached an agreement.

At Bishop Ford, the strike had generated considerable acrimony between the lay teachers and members of the Franciscan

Order who were also on the faculty. After the parties had reached agreement, the Franciscan Brothers issued a statement deploring the behavior of both Hald and Association representatives during the strike and expressing their intention to reconsider their future commitment to the school. The Brothers discussed withdrawal from Bishop Ford.

To prevent a withdrawal of the religious teachers, a group of parents proposed to the Hald Association that the parents "open a new independent, central Catholic school," and cited the example of other high schools which had previously "separated from the Hald Association to become independent entities" (D-6). The written proposal submitted to Hald suggested creation of a board of trustees which would "take over

the school building and property with a reverter clause that the school building and property return to Diocesan ownership if such a Catholic commitment ceases to exist." The proposal also specified that the trustees would "assume the responsibility for the maintenance of a solvent school operation and the preservation of the school plant and property." In addition, the trustees drafted a by-law defining the board's "powers and duties" as follows:

> The Board shall have such powers as shall be necessary for the proper conduct of the High School and the discharge of the Board's duties, not inconsistent with the Charter of the High School and the education laws of the State of New York. The Board shall elect the Principal of the High School who shall be its Executive Officer and Educational Leader. It shall be the responsibility of the Principal to implement policy decisions made by the Board as such de-

cisions apply to the administration of the High School.

On February 5, 1976, Hald trustees met and voted to close Bishop Ford High School (D-7). The same day, the Bishop Ford parents also met and made the transition to a formal board of trustees. The board consisted of twelve trustees --nine lay persons and three religious (D-7). The name of the school was changed from Bishop Ford High School to Bishop Ford Central Catholic High School ("Ford Central").

On April 13, 1976, the board of trustees of the Diocese, including Diocesan Bishop Mugavero, met and unanimously resolved to transfer the operations of Hald-Bishop Ford to the Ford Central trustees with the understanding that "in the event said school shall cease to be operated as a Roman Catholic

high school, such title to the said premises shall automatically revert to the Diocese without further action on its part." Ford Central applied for and on July 30, 1976, received a charter to operate the high school from the Board of Regents of the New York State Education Department (D-9).

On September 3, 1976, the Diocese formally petitioned the New York Supreme Court, as required by State law, for authority to transfer the high school (D-10, 11). The court approved the application on September 17, 1976. On the same date, a contract was prepared which transferred the real property interest to Ford Central (D-9, 10).

During the summer of 1976, Ford Central trustees accepted applications for employment for the 1976-77 school

year. In an attempt to avoid a deficit, the Ford Central trustees decided to increase the number of religious faculty at the new school. In addition, twenty-five lay teaching positions were created. On or about August 27, 1976, twenty-one of the twenty-five lay teaching vacancies in the new school were filled by "prior faculty" from the old school.

Unfair Labor Practice Proceedings

In or about December 1975, the Association President learned that "a proposal had been received for the taking over of Bishop Ford and that it might be considered." Thereafter, he met with Hald representatives and requested certain information which he deemed necessary to represent unit members at Bishop Ford and bargain concern-

ing the effects of the closing. In March 1976, the Association President advised the chairman of the Ford Central Board of Trustees of the Association's representative status and requested that the board recognize the Association or at least discuss the issue of transfer. Ford Central's chairman refused. Later, by mailgram dated September 8, 1976, the Association President "again requested recognition." By letter dated September 8, 1976, recognition was denied, but Ford Central offered to participate in a Board conducted election. At approximately the same time, Ford Central filed a petition for investigation and certification of bargaining representative with the Board seeking an election in a unit composed of all lay and religious faculty.

Daniel Caffrey, a teacher and Association delegate at Bishop Ford, applied for a teaching position at the new school on or about March 29, 1976. In April 1976, he received notification of his termination as a teacher at Bishop Ford. He was interviewed for a position at the new school on August 10, 1976 but was notified on August 27, 1976 that he would not be hired.

On various dates beginning in December 1976, the Association filed unfair labor practice charges against the Diocese, Hald and Ford Central. In substance, the charges against the Diocese and Hald alleged that the Diocese and Hald violated Section 8(a)(1) and (5) of the National Labor Relations Act ("Act") by negotiating in bad faith with the Association con-

cerning plans to lay off teachers at two high schools in the unit and by withholding information from and refusing to bargain with the Association concerning plans to terminate operations at and "spin off" Bishop Ford. Charges against Ford Central alleged that Ford Central, as alter ego of the Diocese, violated Section 8(a)(1) and (5) of the Act by refusing to meet, confer and bargain with the Association concerning Ford Central's succession to the operations of Bishop Ford; discharging unit employees at the school; withdrawing and withholding recognition from the Union as bargaining agent of unit employees and refusing to honor the existing collective bargaining agreement with respect to the school. The Association also charged the Diocese and Ford Central

with violation of Sections 8(a)(1) and (3) of the Act by reason of their discriminatory refusal to hire employee Danial Caffrey because of his activities on behalf of the union.

A total of four charges were filed by the Association. Complaints were issued by the Regional Director for Region 29 and thereafter issue was joined. Hearings were held commencing on September 13, 1976 and ending on January 24, 1977 in Brooklyn, New York.

On July 28, 1977, in a seventy-two page decision, Administrative Law Judge Frank H. Itkin found that the Diocese and Hald violated Section 8(a)(1) and (5) of the Act by failing to bargain in good faith with the Association over the decision and effects of the decision to close Bishop Ford high school; and that

Ford Central, as successor employer, violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the union and Section 8(a)(1) and (3) of the Act by refusing to employ Daniel Caffrey because of his persistent union activities at Bishop Ford. The contention of the Board's General Counsel that Bishop Ford is the alter ego of the Diocese was rejected by the Administrative Law Judge, largely on the basis of the testimony of witnesses for Ford Central. The other allegations of unfair labor practices were dismissed.

On May 15, 1978, the Board issued a Decision and Order affirming the rulings, findings and conclusions of the Administrative Law Judge, modifying the remedy in certain respects, not material herein, and adopting the Recommended Order,

as modified (Appendix "F").

Thereafter, the Diocese and Hald petitioned the United States Court of Appeals for the Second Circuit pursuant to Section 10(f) of the Act, (29 U.S.C. §151 et. seq.) to review and set aside the Board's Decision and Order. The Board filed a cross-application pursuant to §10(e) of the Act (29 U.S.C. §151 et. seq.) requesting that the Decision and Order with respect to the Diocese, Hald and Ford Central be enforced in all respects. The Association, the original charging party in the unfair labor practice proceedings, petitioned for and was granted intervenor status by the Second Circuit Court of Appeals.

Prior to oral argument on the applications for review and enforcement, however, this Court entered a decision in

National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) [hereinafter "Catholic Bishop"]. On April 27, 1979, the Second Circuit Court of Appeals heard argument on the stipulation of the Board, Hald, the Diocese and Ford Central to remand the cases to the Board for dismissal in light of Catholic Bishop. The intervenor Association objected to the remand for dismissal of that portion of the Decision and Order relating to Ford Central. By Order dated April 27, 1979, the Second Circuit Court of Appeals granted the stipulation to remand for dismissal the portion of the cases respecting Hald and the Diocese but remanded "for reconsideration of the Board's jurisdiction in light of Catholic Bishop" that portion of the

case known as National Labor Relations Board v. Bishop Ford Central Catholic High School (Appendix "E").

On June 25, 1979, the Board, with Member Penello dissenting, issued a Supplemental Decision and Order (243 NLRB No. 24) finding, in accordance with the stipulation of the parties and the Order of the Court of Appeals for the Second Circuit, that Hald and the Diocese are not within the jurisdiction of the Board and dismissing the consolidated complaint with respect to such respondents. The Board affirmed its original Decision with respect to Ford Central on the basis of a finding that Ford Central, which "operate[s] as a separate institution, governed by an independent lay board of trustees over whom the Diocese has no control," is not a church-operated

school within the meaning of Catholic Bishop (Appendix "D" pp. D-3, 4, 13).

The Board petitioned the Court of Appeals for the Second Circuit for enforcement of its orders issued on May 15, 1978 and June 25, 1979. The Second Circuit denied enforcement, holding that the Board lacked jurisdiction on the basis of this Court's decision in Catholic Bishop (Appendices "A" and "C").

On June 25, 1980, the intervenor Association petitioned the Court of Appeals pursuant to Rule 35 of the Federal Rules of Appellate Procedure for reconsideration and rehearing en banc. By Order dated October 2, 1980, the petition for rehearing was denied (Appendix "B").

The Association now petitions this Court for a writ of certiorari to review

the judgment of the United States Court of Appeals for the Second Circuit denying the Board's petition for enforcement of its orders issued May 15, 1978 and June 25, 1979.

REASONS FOR GRANTING THE PETITION

I

THE COURT OF APPEALS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.

A. The Court of Appeals Determined That Lay Teachers in Educational Institutions Neither Owned Nor Operated By a Church Are Excluded From the Protection of the National Labor Relations Act.

In the matter presented for review, the United States Court of Appeals for the Second Circuit held that the Board was precluded from asserting jurisdiction over a non-church operated school

by reason of the school's "religious mission." Disregarding numerous distinctions between the church-operated employer in Catholic Bishop and the lay-employer in Ford-Central found to be critical by the Board and, in fact, an earlier three-member panel of his own court, Judge Mulligan, writing for the Court of Appeals, concluded that this Court in Catholic Bishop "intended no particular limitation in using the term 'church-operated' to describe religious schools" (A-11). It is submitted that the Court of Appeals erroneously and unnecessarily expanded the exemption from Board jurisdiction created by this Court in Catholic Bishop.

Catholic Bishop was the first and, to date, the only case in which this Court has considered the interface

between the Religion Clauses of the First Amendment and the National Labor Relations Act. In order to fully understand the nature and significance of the Second Circuit's misinterpretation of the decision of this Court, it is important to consider briefly the background and the parties, and, more importantly, the questions presented and decided by this Court in Catholic Bishop.

As described in the opinion delivered by Mr. Chief Justice Burger, the parties respondent in Catholic Bishop consisted of two groups of schools, one composed of two "minor seminaries" operated by the Catholic Bishop of Chicago, a corporation sole, and the other composed of five schools operated by the Diocese of Fort Wayne-South Bend, Inc., 440 U.S. at 492. The Board asserted

jurisdiction over both employers and ultimately issued orders requiring the Bishop and the Diocese to bargain with representatives of the lay faculty at the subject institutions. Reasoning that the "Board's action would impinge upon the freedom of church authorities to shape and direct teaching in accord with the requirements of their religion" and that "the requirement of bargaining [would] impose [a chilling aspect] on the exercise of the bishops' control of the religious mission of the schools," the Seventh Circuit found that the Free Exercise Clause and the Establishment Clauses of the First Amendment foreclosed Board jurisdiction. Id. at 496. Enforcement of the bargaining order was denied.

This Court granted certiorari to consider first, the statutory question

of whether Congress intended Board jurisdiction to extend to "schools operated by a church to teach both religious and secular subjects" and second, the constitutional question of whether, assuming the Board possessed statutory jurisdiction, such jurisdiction could be exercised within the limitations of the Religion Clauses of the First Amendment. Id. at 491. In a five to four decision which did not reach the constitutional issue, this Court denied the Board's attempt to exercise jurisdiction on the grounds that "[t]here is no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act." Id. at 504.

Ford Central is neither church-owned nor church-operated. The record

on the issue of Ford Central's functional independence from the Diocese of Brooklyn, developed during the course of Ford Central's defense to the Board's allegation that it was the alter ego of the Diocese, is voluminous. The Administrative Law Judge concluded that the General Counsel had failed to make a showing of any interrelation of operations, centralized control over labor relations, common management and/or common ownership and financial control. The Board affirmed on two separate occasions (Appendices "D" and "F").

There is no question that Ford Central's independence from church control places it outside the scope of the narrow exemption from Board jurisdiction created by this Court in Catholic Bishop. The issue of whether teachers in non-church

operated schools are protected by the Act was neither raised nor litigated in Catholic Bishop. In fact, the broad interpretation of Catholic Bishop developed by the Court of Appeals is without support in the language or reasoning of the opinion authored by the Chief Justice.

It is apparent that the Court's choice of terminology in Catholic Bishop was more than a matter of "convenien[ce]" (A-12). Never before had the Court considered the manner in which the Religion Clauses of the First Amendment limited the breadth of the Board's jurisdiction under the Commerce Clause. In view of the Court's history of according an extremely broad interpretation to Section 10(a) of the Act, it was essential that the Court proceed cautiously in removing the protection of the Act from groups of employees theretofore deemed covered. See,

National Labor Relations Board v. Reliance Fuel Corp., 371 U.S. 224 (1963). Guss v. Utah Labor Relations Board, 353 U.S. 1, (1957); Polish National Alliance v. National Labor Relations Board, 322 U.S. 643 (1943).

Moreover, the fact that the Court, in numerous decisions involving public aid, has employed descriptive terminology considerably more generic than the terminology employed in Catholic Bishop strengthens rather than diminishes petitioner's claim. The Court of Appeals concedes that "church-operated is clearly the predominant descriptive term used in the opinion ..." (A-12). The text of the decision evidences that the Court was fully aware of the options available (A-12). It is submitted that had this Court intended, as postulated by the

Court of Appeals, to effect a broad withdrawal from Board jurisdiction of all institutions with a "religious mission," the Court could easily have used the terms "parochial" or "religious" or "nonpublic" exclusively or in conjunction with the term "church-operated."

The Court's concern in Catholic Bishop was that entanglement would be the outgrowth of Board involvement with "clergy-administrators." The decision of this Court carefully explicated the dangers inherent in such a situation:

> The resolution of [unfair labor practice] charges by the Board in many instances, will necessarily involve inquiry into the good faith of the position asserted by clergy-administrators and its relationship to the school's religious mission.
>
> * * *
>
> Inevitably the Board's inquiry will implicate sensitive issues

> that open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for the unions. 440 U.S. at 502, 503.

The record in the instant case demonstrates that clergy-administrators do not establish policy at Ford Central (A-14).[2/] On remand from the Court

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2/ Prior to 1976, Ford Central [then Bishop Ford] was owned by the Diocese of Brooklyn and operated by the clergy-administrators of Hald. In response to pressure from the Diocese to curtail operations and friction between the religious faculty, Hald and the union that had developed during labor negotiations, a proposal was drafted in early 1976 to transfer the ownership and operation of the school to a parent group. Steps were taken toward implementation of the plan and in September, 1976, the transfer was finalized by the execution of a contract transferring the real property and operations to the Ford Central lay board of trustees. The New York State Supreme Court approved the Diocese's application, required by law, for authority to transfer the high school on September 17, 1976. (See Appendix "D", pp. D-6 through D-10.)

of Appeals, following the decision of this Court in Catholic Bishop, the Board analyzed the record in light of this Court's decision and correctly concluded that the Board's assertion of jurisdiction would present no danger of entanglement of the government with the church (D-14). The Board reasoned:

> The Union will be negotiating with an entity which, whatever the religious orientation of its curriculum, is unconnected with the Diocese, over a unit consisting of lay teachers at the school. There is no special church-teacher employment relationship here that the Supreme Court foresaw as possibly leading to serious First Amendment questions. We find no impediment to the assertion of jurisdiction over [Ford Central] and will reaffirm our original Decision and Order with respect to that Respondent.

It is significant that after Catholic Bishop the Board and the petitioner herein agreed that the Diocese and Hald were no longer subject to Board jurisdiction. A

stipulation was entered into requesting the Second Circuit to dismiss the portion of the unfair practice proceedings respecting the Diocese and Hald. The stipulation was ultimately accepted by the court (E-2, E-3). The question of whether that portion of the proceedings respecting Ford Central should also be dismissed in light of Catholic Bishop was raised and litigated at the same time. A three-member panel concluded that the Ford Central proceedings should not be dismissed and remanded that portion of the case to the Board for reconsideration (E-3, E-4).

It is submitted that the Board, on remand, properly completed the task assigned by the Court of Appeals. There is no question but that the Board applied a "reasonable legal standard" in determining

the scope of its jurisdiction under the Act as limited by Catholic Bishop. National Labor Relations Board v. Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, 434 U.S. 335 (1978); National Labor Relations Board v. Hearst Publications, Inc., 322 U.S. 111 (1944). Indeed, had this Court in Catholic Bishop clearly expressed an intention to exclude all "parochial" or "nonpublic" schools from Board jurisdiction, the Court of Appeals would have dismissed that portion of the enforcement proceedings respecting Ford Central in the first instance. Nor is there any dispute that the Board's conclusion with respect to Ford Central's status as an independent, non-church operated institution is supported by substantial evidence

in the record. 29 U.S.C. §160(c). See Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951).

In essence, the Court of Appeals has developed a new jurisdictional standard. One year ago, this Court removed church-operated schools from Board jurisdiction. Now, in the Second Circuit, the Board is prohibited from exercising jurisdiction over any employer who purports to engage in a "religious mission." It is incumbent upon this Court to determine whether the Court of Appeals' expansion of the class of exempt institutions was necessary and appropriate, and justified on the facts of this case.

B. The Court of Appeals Determined That the Identity of the Party in Control of Labor Relations is Irrelevant in Determining Exemption From Board Jurisdiction.

In further support of its decision to deny enforcement of the Board's order under Catholic Bishop, the Court of Appeals found that Ford Central is not a legal entity "separate and distinct from the Church" (B-13). The basis for the court's conclusion is the Diocese's retention of a reversionary interest in the school's property. It is submitted that the Court's determination is erroneous as a matter of fact and law. More importantly, however, the court's ruling calls into question numerous decisions of the Board and the federal courts which hold that the element of control of the enterprise, and particularly control of

the employment relationship, is decisive in determining whether an employer shares another organization's exemption from Board jurisdiction.

The petitioner does not deny that the Diocese retains a reversionary interest in the premises. It is apparent, however, both from the contract and the actual experience of the parties, that the reversionary interest is not accompanied by any present right to exercise control. The contract prepared for the transfer of real property to Ford Central provides, inter alia,

> TO HAVE AND TO HOLD the same so long as the grantee continues the operation of a Roman Catholic High School upon the premises described herein, upon the cessation of which all rights, title and interest conveyed shall revert to the grantor, or its successor.
>
> * * *
>
> 5. In the event it shall, for any reason, cease to operate said

> High School, title to the premises herein described shall automatically revert to the "Diocese" without further action on its part.
>
> * * *
>
> 7. It is understood that "Bishop Ford" [Ford Central] in all respects shall have sole and exclusive responsibility for the operation and maintenance of the school and that whatever debts, obligations, or liabilities, legal or equitable, which are incurred by "Bishop Ford" in the course of said operations and maintenance will be the sole responsibility of "Bishop Ford" and shall not inure, devolve or attach to the "Diocese" in any way. Management and control of the premises shall rest exclusively with "Bishop Ford." (D-9, 10)

At the hearing, the chairmen of the Ford Central steering committee and board of trustees testified that Ford Central trustees bear exclusive responsibility for making hiring decisions and determining the terms and conditions of employment for personnel at the new school. Conversely, their testimony conclusively

established that neither the Diocese nor Hald have any input into or authority to review such decisions.[3/] It is significant to note that the purpose of Ford Central's demonstration of its functional independence from the Diocese and Hald was to escape the reach of Hald's contract with the petitioner.

3/ Evidence consisted of the uncontroverted testimony of Stephen Faughnan, chairman of the Ford Central "steering committee," Justin Mahoney, chairman of the Ford Central board of trustees and William Arnold and Madeline Pettrozo, members of the Ford Central board of trustees to the effect that: the Diocese and Hald do not participate in hiring or firing Ford Central personnel and specifically, Ford Central has no relationship with the Diocese's Catholic Schools Office; actual hiring decisions at Ford Central are made by the Ford Central board of trustees; teachers at the new school are no longer covered by the Diocese's pension, group or health insurance plans; Ford Central trustees are examining new pension plans for their teachers and the new school's insurance broker has no connection with the Diocese or Hald; there is a new and different faculty handbook, school

The question of whether an employer shares in the exemption of another organization has, since the inception of the Act, turned on the degree to which the exempt organization retains control of the employment relationship. See, e.g., National Labor Relations Board v. E.C. Atkins & Co., 331 U.S. 398 (1946). Absent a showing that the exempt organization retains control over the critical incidents of the employer-employee rela-

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3/ (continued) manual and school calendar and the Diocese and Hald had no input in the preparation of these items; personnel and pay records for the old school were removed by Hald and the Diocese and Hald do not have access to the new school's records; the salary schedule for teaching personnel at the new school is higher than the salary schedule for teachers at the old school. It is also significant that there is no financial relationship between the Diocese and Hald and the new school.

tionship or that the employer cannot engage in meaningful collective bargaining, the Board and the federal courts have consistently denied the employer's claim to the exemption. National Labor Relations Board v. Howard Johnson Co., 317 F.2d 1 (3rd Cir. 1963), cert. denied, 375 U.S. 920. Accord.: National Labor Relations Board v. Highview, Inc., 590 F.2d 174, (5th Cir.) modified on other grounds, 595 F.2d 339 (5th Cir. 1979); Compton v. National Maritime Union of America, AFL-CIO, 533 F.2d 1270 (1st Cir. 1976). No such showing was made here.

Even in the situation, not present here, where an exempt organization retains the power to veto employment and dismissal decisions as well as the authority to subject bargaining unit employees to disciplinary procedures outside of the collective bargaining agreement, this

Court has held that the Board's exercise of jurisdiction is proper. National Labor Relations Board v. E.C. Atkins, supra. Similarly, Board jurisdiction will not be disturbed where an employer operates a facility pursuant to a lease or other contractual arrangement with an exempt organization or entity. National Labor Relations Board v. Howard Johnson Co., supra.

It is apparent that the Court of Appeals has established a new rule for determining whether an employer shares the exempt status of another organization. The rule appears to be that where there is any evidence of a possible future relationship between the employer and the exempt organization, Board jurisdiction will be denied. Evidence that the employer retains significant, if not ex-

clusive, control over labor relations is no longer relevant. It is submitted that the approach adopted by the Court of Appeals in the instant case represents a serious departure from thirty years of decisional authority of the Board and the federal courts. For this reason, review and consideration by this Court is essential.

II

THE COURT OF APPEALS' ANALYSIS OF THE QUESTIONS PRESENTED SO FAR DEPARTS FROM THE STANDARDS ESTABLISHED BY THIS COURT AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF REVIEW.

The process by which the Court of Appeals arrived at the conclusion that Ford Central is not subject to Board jurisdiction is infirm in two critical respects: the court neglected in its analysis of the infringement issue to

recognize the parties' actual long-standing experience in a collective bargaining relationship under the Act and failed in deciding the jurisdictional question to give any consideration to the language or legislative history of the Act. It is petitioner's belief that this Court established the model for proceeding in this new and difficult area in Catholic Bishop and that the Court of Appeals was bound to follow that process in this case. Regional offices of the Board and labor organizations across the country are looking to the courts for guidance in administering the exemption from Board jurisdiction created by this Court in Catholic Bishop. Unless this Court entertains this application for review and reaffirms the standards for proceeding in this area, substantial confusion will

result and the protected status of thousands of employees will be jeopardized.

The first question considered by this Court in Catholic Bishop was whether the Board's exercise of jurisdiction over church-operated schools would present a significant risk of First Amendment infringement, 440 U.S. at 502. In resolving this question the Court focused on "the church-teacher relationship in a church-operated school" and "the potential that the Board's inquiry [would] open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for the unions," Id. at 501, 502. Ultimately the Court concluded, "we see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment

questions that would follow." Id. at 504.

Having answered the first question in the affirmative, the Court proceeded to consider the second question: whether Congress had clearly expressed an affirmative intention that teachers in church-operated schools be covered by the Act. Acknowledging at the outset that Congress had "defined the Board's jurisdiction in very broad terms," the Court examined the legislative history of the Act from 1935 through and including the 1974 health care amendments. Id. at 504-507. The Court concluded that "[t]here is no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act." Id. at 504.

Resolution of the first question in

Catholic Bishop was more difficult than the second. In the absence of a prior relationship between the Board, the Union and the church-operated schools, there was simply no means by which the Court could discover whether the exercise of jurisdiction would actually result in infringement. The Court had available the record of the Board proceedings and little else. In the end, the Court was required to anticipate First Amendment problems that could possibly develop in the circumstances presented.4/

In the case below, however, there was no necessity for prediction. The record shows that the Diocese had recognized the

4/ For example, this Court noted that if the Board were permitted to exercise jurisdiction, it might, in the future, be called upon to define what are "terms and conditions of employment" and therefore mandatory subjects of bargaining. 440 U.S. at 502-503.

petitioner as collective bargaining representative in 1966.[5] A ten year collective bargaining history and numerous Board proceedings were available for examination.[6] Moreover, Ford Central, subsequent to its creation as a separate entity, did not perceive that conflicts would flow from the Board's exercise of jurisdiction: it had offered to participate in a Board

5/ The court failed to point to any actual or perceived First Amendment problems during the entire period of the Diocese's ownership and operation of the school. If conflicts did not arise during the period of diocesan ownership, a fortiorari, it would be incongruous to speculate that any such conflicts would arise under independent lay ownership.

6/ See, e.g. Nazareth Regional High School v. National Labor Relations Board, 549 F.2d 873 (2nd Cir. 1977); Roman Catholic Diocese of Brooklyn, 222 NLRB 1052 (1976) enforced in part sub. nom. Nazareth Regional High School v. National Labor Relations Board, supra; Henry M. Hald High School Association, 213 NLRB 415 (1974) and 216 NLRB 512 (1975).

election and had filed an employer petition requesting the Board to conduct an election.[7/] In fact, the only reason that the dispute between the petitioner and the school was not resolved by an employer initiated election was that the Board had

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7/ In September, 1976, the petitioner requested recognition. Ford Central replied:

> Please be advised that the Board does not believe that your labor organization represents a majority of the Faculty at Ford Central and for that reason we must decline your demand. However, we would be willing to participate in an NLRB conducted representation election in an appropriate unit. We suggest that you file a petition with the NLRB for that purpose so that this question may be resolved without undue delay

When the petitioner did not act in accordance with Ford Central's suggestion, however, Ford Central filed its own petition for investigation and certification of representatives, commonly known as an "RM" petition, at Region 29 of the Board. Ford Central sought an election in a unit composed of all faculty, lay and religious, employed at the school.

issued complaints on the unfair practice charges filed by the petitioner. Ford Central's First Amendment claim, which ultimately became the decisive factor in the enforcement proceeding, was not raised until after the conclusion of the administrative hearing.

Yet, with all of this information in the record or readily available, the Court of Appeals resolved the infringement issue based on an examination of the Ford Central faculty handbook (A-5 through A-7). It is submitted that on the facts of this case, the Court of Appeals was obligated to consider the state of the entire record, including the actual experiences and perceptions of the parties, in making a determination on the First Amendment issue.

The court's error in refusing to consider the facts on the infringement issue

is compounded by its avoidance of statutory analysis. The dissent's criticism of the principle of statutory construction employed by the majority notwithstanding, it is apparent that it was not the intention of this Court in Catholic Bishop to abandon the process of statutory construction entirely. Indeed, petitioner reads the lengthy statutory analysis in Catholic Bishop to reaffirm the necessity for careful statutory scrutiny in this area.

The opinion of the Court of Appeals appears to stand for the proposition that statutory analysis is not necessary once an employer has been identified as having both a secular and "religious mission." Such a conclusion, however, is wholly without support in the opinions of this Court. In numerous decisions spanning decades of experience under the Act, this Court has held that Congress, by employing

the language "affecting commerce," meant to reach "the full extent of its power under the Commerce Clause." See, e.g., Guss v. Utah Labor Relations Board, supra.

To be certain, there are constitutional limitations on the Board's exercise of jurisdiction. Polish National Alliance v. National Labor Relations Board, supra. This Court did not decide the constitutional issue in Catholic Bishop. Nor, however, did it decide that the potential for constitutional violation alone would remove an otherwise covered employer from Board jurisdiction. Instead, the Court established a two-part test requiring consideration first of the potential for infringement and second, congressional language and intent.

It is implicit in the two-part test that the situation may arise where a

finding of potential infringement is coupled with a finding that Congress clearly expressed an affirmative intention to cover the employer. In such circumstances, the federal courts will necessarily be called upon to consider the constitutional issue.

The petitioner herein understands that constitutional analysis may be appropriate in this case after a proper analysis has been made of the infringement and jurisdictional issues. Whether or not such analysis is required, however, it is clear that petitioner was given short-shrift and denied the benefit of the careful approach developed by this Court. More important to the instant application for review, however, if the decision of the Court of Appeals is allowed to stand, it is clear that neither the Board, nor any labor organization in

this circuit will have the opportunity to test the statutory or constitutional limits of the Board's jurisdiction.

The Court of Appeals relied heavily on the school aid cases decided by this Court in denying the Board's petition for enforcement. The petitioner submits, however, that if there is one lesson from the school finance cases that is applicable to these proceedings, it is that where constitutional and particularly First Amendment issues are concerned, each case deserves consideration on its own merits. "[W]e must examine the form of the relationship for the light that it casts on substance." Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). Indeed, this Court has often reminded that Thomas Jefferson's characterization of the relationship between church and state as

a "wall of separation" is far too simplistic: "the line of separation, far from being a 'wall' is a blurred, indistinct and variable barrier depending on all the circumstances of the particular relationship." Id. See, also, Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970); Committee for Public Education and Religious Liberty, ____ U.S. ____, 63 L. Ed 2d 94 (1980).

The Court of Appeals' removal of all institutions with a "religious mission" from Board jurisdiction was precipitous and, on the record of this case, unnecessary.[8/] As a result of the court's de-

8/ As pointed out by the Board below, the Court of Appeals' broad interpretation of Catholic Bishop could lead to overruling many cases in which the Board has taken jurisdiction of the commercial and other activities of employers with religious affiliations. See, e.g., The First Congregational Church, 189 NLRB 911, 912 (1971) (operation of a cemetary);

cision, potentially thousands of workers employed in institutions which claim to engage in a "religious mission" will lose their statutory rights to bargain collectively and their constitutional rights of association. Without the protection of the Act, they will be forced to accept working conditions that have long been history for organized labor and economic forces will militate their silence.

8/ (continued) The First Church of Christ, 194 NLRB 1006, 1008 (1972) (publishing and real estate); Carrol Manor Nursing Home, 202 NLRB 67 (1973); National Lutheran Home for the Aged, 203 NLRB 408, 409 (1973). Moreover, overruling an entire body of law by implication would violate the well recognized principle of judicial interpretation that decisional precedent stands unless expressly, rather than impliedly, overruled. See, 1B Moore's Federal Practice, ¶0.402 n. 33.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 859—September Term, 1979

(Argued March 20, 1980 Decided June 17, 1980)

Docket No. 79-4166

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

LAY FACULTY ASSOCIATION, LOCAL 1261,

Intervenor,

against

BISHOP FORD CENTRAL CATHOLIC HIGH SCHOOL,

Respondent.

Before:

LUMBARD, MULLIGAN and OAKES,

Circuit Judges.

Application of the National Labor Relations Board for enforcement of its orders issued on May 15, 1978 and June 25, 1979 against respondent Bishop Ford Central Catholic High School finding that respondent had violated sections 8(a) (1), (3) and (5) of the National Labor Relations Act. Enforcement denied because the Board lacked jurisdiction over the respondent.

CHARLES P. DONNELLY, Washington, D.C. (National Labor Relations Board, Paul J. Spielberg, Norton J. Come, John E. Higgins, Jr., Robert E. Allen, Elliott Moore, Washington, D.C., of counsel) for Petitioner.

JEFFREY S. KARP, New York, N.Y. (Eugene M. Kaufman, New York, N.Y., of counsel), for Intervenor.

KEVIN J. MCGILL, New York, N.Y. (Clifton Budd Burke & DeMaria, Robert A. Wiesen, New York, N.Y., of counsel), for Respondent.

MULLIGAN, *Circuit Judge:*

The dispositive issue raised by this application for enforcement of orders of the National Labor Relations Board (the Board) is whether Bishop Ford Central Catholic High School (Ford Central) is subject to the jurisdiction of the Board. On May 15, 1978 the Board

found that Ford Central had violated sections 8(a) (1), (3) and (5) 29 U.S.C. §§ 158 (a) (1), (3) and (5), of the National Labor Relations Act (the Act) by refusing to recognize the Lay Faculty Association (the Union) as the representative of its lay faculty. 236 NLRB No. 3. On March 21, 1979, the Supreme Court in *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490 (affirming the Seventh Circuit's decision, 559 F.2d 1112 (1977) held that the Board lacked statutory jurisdiction over "church-operated schools."[1] On a petition for enforcement of the Board's order in the instant case, this court remanded the matter to the Board on April 27, 1979 for reconsideration in light of the *Catholic Bishop* decision. On June 25, 1979, the Board, with Member Penello dissenting, issued a supplemental decision (243 NLRB No. 24) affirming its decision as to Ford Central. This enforcement proceeding followed.

Since we hold that the Board lacked jurisdiction we do not consider the merits of the other issues which have been raised on this appeal.

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1 The Seventh Circuit had squarely held that the assertion of jurisdiction by the Board over the lay faculties there involved constituted a violation of both the Free Exercise and Establishment Clauses of the First Amendement. 559 F.2d at 1123-26. The Supreme Court did not reach the constitutional issue. Chief Justice Burger writing the majority opinion preferred to avoid the constitutional issue and instead construed the Act not to cover lay teachers in church-operated schools since their inclusion would embroil the Board and the Court in difficult and sensitive questions arising out of the Religion Clauses of the First Amendment. 440 U.S. at 507. Justice Brennan, in a dissent joined in by Justices White, Marshall and Blackmun, construed the Act to cover the lay teachers involved. This would involve constitutional issues but the dissent did not reach them. "I do not now do so only because the Court does not." 440 U.S. at 518.

I

In order to determine whether Ford Central is within the holding of *Catholic Bishop* we must examine the history of the school as well as its present religious characteristics. For many years, the Roman Catholic Diocese of Brooklyn (the Diocese) owned and operated nine Catholic high schools in Brooklyn and Queens including Bishop Ford. In June 1972, a task force commissioned by the Bishop of the Diocese recommended the termination of the existing diocesan high school system. As an alternative, the Diocese in 1972 incorporated the Henry M. Hald High School Association (Hald), an educational corporation which was to operate a number of the Catholic high schools in the diocese including Bishop Ford. By 1975 two high schools were closed and two others were transferred to religious communities or private boards. During the fall of 1975, faced with the possibility that Bishop Ford might be closed, parent groups at the school began discussions to determine the feasibility of turning the school over to a private board of trustees. In February 1976 Hald determined to close Bishop Ford and transfer it to an independent board. Brother Alphonsus Maher, who was then the principal of the school, resigned and became the first principal of the respondent Ford Central.

On September 3, 1976 the Diocese and Ford Central entered into an agreement which conveyed title to the land, buildings, improvements, fixtures and appurtenant personal property to Ford Central. The agreement recites that Ford Central is to hold title, however, only so long as it "continues the operation of a Roman Catholic high school." If it ceases to operate as a Roman

Catholic high school, all rights, title and interest revert automatically to the Diocese.

Other provisions of the agreement require Ford Central to maintain the premises in good condition, and not to make major alterations or place any encumbrances or mortgages upon the premises without the approval of the Diocese. Ford Central is required to keep the buildings and contents insured in amounts and kinds of coverage satisfactory to the Diocese. Although the Diocese continues to maintain a portion of the premises for its Educational Television project, the agreement makes it clear that Ford Central is solely responsible for the "operation and maintenance of the school," and assumes responsibility for its "debts, obligations, or liabilities."

The record demonstrates and it is undisputed that Ford Central is a Roman Catholic school. Its title is "Bishop Ford Central Catholic High School." Its motto is "To Imitate Jesus." All the members of the Board of Trustees are Roman Catholics, and its two highest administrators, the principal and assistant principal, are Franciscan Brothers. The professional staff of the school is composed predominantly of teachers who are members of Roman Catholic religious orders.

The philosophy of the school is stated in its faculty manual, in these terms:

> The success of this school as a Catholic school will depend on each faculty member striving as an individual and as a member of a unified faculty to form with the assistance of the Holy Spirit a *community of faith* where gospel values are the norm and Christian virtues are experienced.

This school will only be as good as the individual faculty members that make it up. The success of this academic year will depend on each faculty member contributing his/her

- religious conviction
- professional competence
- personal integrity
- belief in youth

to encourage student growth, to support fellow members of the faculty and staff and to assist administrators.

Each and every member of the faculty is to PROMOTE and UPHOLD the philosophy of this school.

The Philosophy of
Bishop Ford Central Catholic High School

Bishop Ford Central Catholic High School is a community of persons—administrators, teachers, students and staff united by their common bond: faith in God as expressed in the Roman Catholic tradition.

The administrators and teachers recognize the mandate that "The future of humanity lies in the hands of those who are strong enough to provide coming generations with reasons for living and hoping." (*The Church Today,* 31)

In accepting this mandate, we work together to assist each student in his striving to become a mature and fulfilled Christian. Through our guidance, instruction and example, we ask that each student imitate Jesus who "advanced in wisdom and age and grace before God and men." (Luke 2:52)

We provide spiritual, educational and social opportunities which coincide with the threefold aim of Catholic education as defined in the pastoral, *"To Teach as Jesus Did."* (Emphasis in original.)

***

Above all, we recognize that this philosophy must be the guiding force behind all school programs and policies.

The religious responsibilities of the faculty as set forth in the manual are quite explicit:

RELIGIOUS RESPONSIBILITIES

> Students cannot be expected to value a faith commitment or value participation in religious activities if faculty members fail to witness a vibrant interest in a Christian life style.
>
> Each faculty member is expected:
>
> — to witness Christ-like behavior (e.g. attitude, demeanor).
> — to patiently encourage students to foster Christian attitudes.
> — to participate in school liturgies and paraliturgical activities.
> — to encourage, but not FORCE student participation in school liturgies and paraliturgical activities.
> — to cooperate with the priest chaplain and religion department.

When a teacher applies for a position at Ford Central, the application form states specifically, "A Catholic high school has goals, spirit, opportunities, and problems often quite different from other educational institutions. Besides teaching a schedule of classes and

taking a share of supervisory responsibilities, the Catholic high school teacher is expected to involve himself/herself wholeheartedly in the school's basic efforts to provide support and encouragement to a teenager's call to mature as a generous, convinced and practicing Catholic."

In addition Ford Central retains a full-time priest-chaplain who is available for counseling services and who says Mass in the school chapel once a week.

II

The Board order here was initially directed not only to Ford Central but also to the Diocese and Hald. The June 25, 1979 order dismissed the complaint as to the Diocese and its alter ego, Hald, for lack of jurisdiction under *Catholic Bishop*. This underscores the Board's position that Ford Central is within its jurisdiction only because it has severed its relationship with the Diocese. The Board did not in its opinion or on this appeal argue that Ford Central is not sufficiently Roman Catholic in its philosophy, its curriculum or in the obligation of its faculty to propagate the Roman Catholic faith and to indoctrinate the student body with the tenets of that faith. The position of the Board rather is that, having been separated from diocesan ownership and management, Ford Central is no longer "church-operated" under *Catholic Bishop*. We do not read *Catholic Bishop* so narrowly.

The minor seminaries and secondary schools whose lay faculties had been unionized in *Catholic Bishop* were owned and operated by either the Bishop of Chicago, a corporation sole, or by the Diocese of Fort Wayne-South Bend, Inc.. They were therefore properly

described as church-operated schools. However, the fact that legal title to and management responsibility for the schools were vested in the church was not at all the reason for the entanglement problems created by Board asserted jurisdiction over the lay faculties of those institutions. Rather, the Court's concern was that, despite well intentioned Government involvement, the Board could not avoid "entanglement with the religious mission of the school in the setting of mandatory collective bargaining." 440 U.S. at 502.

In order to determine whether the issue of excessive entanglement arose in *Catholic Bishop,* the Court turned to its recent decisions involving aid to "parochial schools." Quoting *Lemon v. Kurtzman,* 403 U.S. 602, 617 (1971), the Court in *Catholic Bishop* stated: "We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education. The conflict of functions inheres in the situation." 440 U.S. at 501. Using language from *Lemon,* the Court further noted: "The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind of Religion Clauses sought to avoid." 440 U.S. at 503, quoting *Lemon v. Kurtzman, supra,* 403 U.S. at 616.

The Court in *Catholic Bishop* also noted the "importance of the teacher's function in a church school." 440 U.S. at 501, quoting from *Meek v. Pittenger,* 421 U.S. 349, 370 (1975):

> "Whether the subject is 'remedial reading,' 'advanced reading' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists."

The Court also quoted Justice Douglas' concurring opinion in *Lemon* where he noted "the admitted and obvious fact that the *raison d'etre* of parochial schools is the propagation of a religious faith." 403 U.S. at 628.

The entire focus of *Catholic Bishop* was upon the obligation of lay faculty to imbue and indoctrinate the student body with the tenets of a religious faith. As we have pointed out in Part I of this opinion, the obligation of the faculty both lay and religious at Ford Central is precisely that. At no place in the Court's discussion of the entanglement problem in *Catholic Bishop* is diocesan ownership and management suggested as the basis for religious entanglement. It is the commitment of the faculty to religious values no matter what subject in the curriculum is taught and the obligation to propagate those values which provides the risk of entanglement.

That the risk is real and not theoretical was pointed out by the Seventh Circuit's opinion in *Catholic Bishop*.

> We are unable to see how the Board can avoid becoming entangled in doctrinal matters, if, for example, an unfair labor practice charge followed the dismissal of a teacher either for teaching a doctrine that has current favor with the public at large but is totally at odds with the tenets of the Roman Catholic faith, or for adopting a lifestyle acceptable to some, but contrary to Catholic moral teachings. The Board in processing an unfair labor practice charge would necessarily have to concern itself with whether the real cause for discharge was that stated or whether this was merely a pretextual reason given to cover a discharge actually directed at union activity. The scope of

> this examination would necessarily include the validity as a part of church doctrine of the reason given for the discharge.

559 F.2d at 1125.

As we have pointed out in Part I, the religious mission of Ford Central was not terminated by its severance from the Diocese. Church dogma and the tenets of Roman Catholicism do not emanate from the Bishop of Brooklyn with all deference to that prelate. The analogy which the Court in *Catholic Bishop* makes to the public aid to parochial school cases is further instructive. If the Board majority is correct in concluding that legal disaffiliation from a diocese eliminates any embroilment with First Amendment Religion Clause guarantees, then Ford Central arguably would be entitled to whatever aid a legislative body might see fit to provide. While this might be a welcome reading of *Catholic Bishop* for those who are proponents of public aid to church related schools, it would be a misinterpretation. We have searched in vain for any case involving public aid where the Court distinguished between Catholic, or other denominational, primary or secondary schools owned and operated by diocesan authority and those owned and operated by religious or lay groups. It is the suffusion of religion into the curriculum and the mandate of the faculty to infuse the students with the religious values of a religious creed which create the conflict with the Religion Clauses and not the vesting of legal title or the responsibility of operation.

That the Court in *Catholic Bishop* intended no particular limitation in using the term "church-operated" to describe religious schools is quite evident, aside from our previous discussion, in the text of the

opinion itself. Thus Chief Justice Burger stated that "[t]he church-teacher relationship in a church-operated schoo[l] school differs from the employment relationship in a public or other nonreligious school." 440 U.S. at 504. Ford Central is obviously not a public or nonreligious school, and is therefore within the Court's own conception of a church-operated school. While there may be an issue in some cases as to how much religious orientation is required to characterize a school as religious, that is not the dispute here. Moreover, although "church-operated" is clearly the predominant descriptive term utilized in the opinion, the Court also speaks of "parochial schools," *id.* at 501, "a church school," *id.* at 501. It also refers to the entanglement with church-operated schools found unacceptable "in *Lemon, Meek* and [*Wolman v. Walter*, 433 U.S. 229 (1977)]," *id.* at 502. We note in the margin the descriptions of those schools by the Supreme Court.[2]

In sum we conclude that the *Catholic Bishop* Court employed the term "church-operated" not in the restricted sense now seized upon by the Board, but rather as a convenient method of characterizing schools with a religious mission.

III

Although we hold that enforcement of the Board's order should be denied under *Catholic Bishop* on the

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2 In *Lemon*, the church-operated schools at issue were referred to by the Court as "church-related," 403 U.S. at 606, "church schools," *id.* at 615, and "parochial schools," *id.* at 616. In *Meek*, the Court used the terms "nonpublic school," 421 U.S. at 361, "parochial schools," *id.* at 360, "church-related institutions," *id.* at 363, and "religiously affiliated educational institutions," *id.* at 364. The *Wolman* Court described the schools in that case as "nonpublic," 433 U.S. at 250, "church-sponsored," *id.* at 251, and "church-related," *id.* at 251.

basis of the religious mission of Ford Central, we do not overlook the fact that the Diocese here has not completely severed its relationship with Ford Central but has retained a significant degree of control. While the ownership and operation of the school has been left in the hands of a lay board of trustees who have selected religious administrators and a professional staff predominantly affiliated with religious orders, the agreement of September 3, 1976 explicitly provides that "the 'Diocese' is desirous of making the property herein described available for the purposes of the operation of a Roman Catholic high school upon the conditions herein set forth." The first condition of the agreement is that Ford Central shall have and hold the property "so long as the grantee continues the operation of a Roman Catholic high school . . . upon the cessation of which all rights, title and interest herein conveyed shall revert to the grantor, or its successor." Paragraph 5 of the agreement further provides that if the grantee shall "cease so to operate said high school, title to the premises herein described shall automatically revert to the 'Diocese' without further action on its part."

It is the clear and unambiguous intent of the agreement that Ford Central continue to operate as a Roman Catholic secondary school and if the institution should deviate from its religious mission, the Diocese has the right to intervene and automatic reversion to the Diocese ensues. The position of the Board that Ford Central is a legal entity "separate and distinct from the Church" is we submit irrelevant and in any event not accurate. Ford Central is only conditionally separated from the Diocese and the condition imposed is its continuing allegiance and loyalty to the Church.

For these reasons enforcement of the Board's order is denied in its entirety.

OAKES, *Circuit Judge* (concurring):

I think that the question whether Ford Central is "church-operated" within *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979), is not nearly as clear as Judge Mulligan's opinion seems to suggest. Lay administrators rather than "clergy-administrators," *id.* at 502, 503, are here involved. Although Brother Maher was to remain as principal on the transfer from the diocesan entity, Hald, to Ford Central, the by-laws of Ford Central's predominantly lay board of trustees stated that his chief responsibility was to "implement policy decisions made by the Board." Moreover, the contract effectuating the transfer provided that "[m]anagement and control of the premises shall rest exclusively with" Ford Central.

On the other hand, that "management and control" were conditioned by the transfer contract "so long as the grantee continues the operation of a Roman Catholic high school upon the premises." And, most significantly to me, reverter takes place if such operation ceases. Thus, a real string is held by the Diocese and it is in this light, with the attendant indirect control that this condition gives the Diocese, that the entanglement considerations thought significant by the 5-4 majority in *Catholic Bishop, supra*, would also be applicable here. As Judge Mulligan's opinion is careful to point out, *supra* at ____, the analogy to the public-aid-to-parochial-school cases is

instructive and, like him, I have never read them to be confined to church owned and managed schools. Accordingly I concur in the judgment.

APPENDIX B

APPENDIX B

UNITES STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of October, one thousand nine hundred and eighty.

Present:

HON. EDWARD J. LUMBARD,

HON. WILLIAM H. MULLIGAN,

HON. JAMES L. OAKES,

Circuit Judges.

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. BISHOP FORD CENTRAL CATHOLIC HIGH SCHOOL, Respondent, LAY FACULTY ASSOCIATION, LOCAL 1261, Intervenor.	Docket No. 79-4166 U.S. Court of Appeals Filed Oct. 2, 1980 A. Daniel Fusaro Second Circuit

A petition for a rehearing having been filed herein by counsel for the intervenor,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

/s/ by Rolanne Henry
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 2nd day of October, one thousand nine hundred and eighty.

NATIONAL LABOR RELATIONS BOARD, Petitioner, and LAY FACULTY ASSOCIATION, LOCAL 1261, Intervenor, -against- BISHOP FORD CENTRAL CATHOLIC HIGH SCHOOL, Respondent.	79-4166 U.S. Court of Appeals Filed Oct. 2, 1980 A. Daniel Fusaro, Clerk Second Circuit

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the intervenor Lay Faculty Assoc., Local 1261, and no active judge

or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Wilfred Feinberg
Chief Judge

APPENDIX C

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventeenth day of June, one thousand nine hundred and eighty.

Present:

HON. J. EDWARD LUMBARD

HON. WILLIAM H. MULLIGAN

HON. JAMES L. OAKES

Circuit Judges

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. BISHOP FORD CENTRAL CATHOLIC HIGH SCHOOL, Respondent.	) 79-4166)U.S. Court)of Appeals) Filed)Jun 17 1980)A. Daniel)Fusaro,)Clerk)Second)Circuit

An application for enforcement of an order of the National Labor Relations Board.

This cause came to be heard on a certified list of items comprising the record of the National Labor Relations Board and was argued by counsel.

Upon consideration thereof, it is hereby ordered, adjudged and decreed that the application for enforcement be and it hereby is denied in accordance with the opinion of this court with costs to be taxed against the petitioner.

A. DANIEL FUSARO
Clerk
/s/ Arthur Heller
by: Arthur Heller
Deputy Clerk

APPENDIX D

APPENDIX D

243 NLRB No. 24

FJPT
D-5225
Brooklyn, NY

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

ROMAN CATHOLIC DIOCESE OF BROOKLYN, HENRY M. HALD ASSOCIATION, BISHOP FORD CENTRAL CATHOLIC HIGH SCHOOL

and

LAY FACULTY ASSOCIATION, LOCAL 1261, AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Cases 29-CA-4746, 29-CA-4861, 29-CA-5212, and 29-CA-5234

SUPPLEMENTAL DECISION AND ORDER

On May 15, 1978, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding[1/] in which the Board adopted the findings and conclusions of the Administrative Law Judge as contained in his Decision dated July 28, 1977, and ordered that Respondents

1/ 236 NLRB No. 3.

take the action set forth in the recommended Order of the Administrative Law Judge, as modified by the Board. In his Decision, the Administrative Law Judge concluded, inter alia, that the Board had jurisdiction over lay teachers in Respondents' schools. The Board, in its Decision, adopted the conclusion of the Administrative Law Judge.

On March 21, 1979, the Supreme Court issued its opinion in N.L.R.B. v. The Catholic Bishop of Chicago[2/] in which it affirmed the court of appeals' ruling[3/] denying enforcement of the Board's Order in that case.

Thereafter, on April 27, 1979, the

2/ 99 S.Ct. 1313, 85 LC ¶11, 163 (1979).

3/ Catholic Bishop of Chicago v. N.L.R.B., 559 F.2d 1112 (7th Cir. 1977), denying enforcement of 224 NLRB 1221 (1976).

United States Court of Appeals for the Second Circuit in this proceeding issued an Order Remanding Cases to the Board wherein it granted the parties' stipulation to remand for dismissal the portion of the cases respecting Respondent Henry M. Hald Association (hereinafter Respondent Hald) and Respondent Roman Catholic Diocese of Brooklyn (hereinafter Respondent Diocese), and further ordered the Board to reconsider the Board's jurisdiction of that portion of the cases relating to Respondent Bishop Ford Central Catholic High School (hereinafter Respondent Ford Central).

In accord with the stipulation of the parties and the Order of the Court of Appeals for the Second Circuit, we find that Respondent Hald and Respondent Diocese are not within the jurisdiction of the National Labor Relations Board,

and we will dismiss the consolidated complaints with respect to these Respondents.

Upon reconsideration of our prior Decision with respect to Respondent Ford Central,[4/] we affirm our original Decision for the reasons set forth below. The issue herein is whether the recent Supreme Court decision in Catholic Bishop of Chicago, supra, precludes our assertion of jurisdiction over Respondent Ford Central. We find it does not, and we will continue to assert jurisdiction over Respondent Ford Central.

Respondent Diocese is a religious organization operating religious, educational and related institutions in Brooklyn

4/ The statements of position of the Charging Party, the General Counsel, and Respondent Ford Central have been received and duly considered.

and Queens, New York. Respondent Hald is an educational corporation organized in 1972 by Respondent Diocese to operate a system of private, nonprofit Catholic high schools in the same geographical area. Respondent Diocese owns these schools. In our original Decision, we found Respondent Diocese and Respondent Hald to be integrated entities and alter egos. In 1972, there were nine Diocesan high schools within the jurisdiction of Respondent Hald, including Bishop Ford High School. In June 1972, a task force commissioned by the Bishop of Brooklyn recommended that the Diocese terminate its involvement in secondary education by 1973. An alternative plan recommended by the task force involved negotiations with religious communities that had an interest in operating some schools on lease from the Diocese,

and the possibility of operating various schools as regional high schools by lay boards of directors. By 1975, two of the nine Diocesan high schools had closed permanently, and the operations of two others were transferred to religious communities or private boards. During the fall of 1975, faced with the possibility of termination of operations at Bishop Ford, members of the Fathers' Guild and the Mothers' Guild associated with Bishop Ford High School formed a steering committee to explore the possibility of establishing a board of trustees to take over operation of the school. Brother Alphonsus Maher, principal of Bishop Ford High School, with the assistance of the Diocese and Hald personnel, prepared the initial proposals to take over the operation of the school, which were presented by the steering committee to the Hald board.

On February 5, 1976, Respondent Hald decided to close Bishop Ford High School and transfer it to an independent board. On or about February 12, 1976, Brother Maher resigned his position at Bishop Ford High School to become the first principal of the new school, Bishop Ford Central Catholic High School. After that date, he received no compensation from the compensation from the Diocese. During the transition period between February 5, 1976, and the opening of the new school on September 1, 1976, the new school reimbursed Hald for services such as duplicating and mailing that Hald performed for the new school. A board of trustees for the new school began meeting on or about February 5, 1976. The board consisted of nine lay persons and three members of religious orders. None of

these board members had served on the Hald board or were employed by Hald or the Diocese. Neither the Diocese nor Hald participated in the selection of the board of trustees or, for that matter, the precursor steering committee. Furthermore, in May 1976, when the Diocese attempted to nominate two persons to the board of trustees in accord with what the Diocese thought was an understanding reached at the time of the acceptance of the proposal, the nominations were rejected. The Diocese has made no appointments to the new board of trustees.

The Ford Central board of trustees formulated its own curriculum, hired its own faculty, established its own faculty and student handbooks, developed its own personnel policies, and formulated its own budget, all without the input or participation of Hald or the Diocese.

Before the opening of the new school in September 1976, the charter issued by the New York board of regents for Bishop Ford High School was canceled or modified and a new charter issued for Bishop Ford Central Catholic High School.

On September 3, 1976, a contract was prepared for the transfer of the real property to Respondent Ford Central. The contract provided, inter alia;

> TO HAVE AND TO HOLD the same so long as the grantee continues the operation of a Roman Catholic High School upon the premises described herein, upon the cessation of which all rights, title and interest herein conveyed shall revert to the grantor, or its successor.
>
> * * *
>
> 5. In the event it shall, for any reason, cease so to operate said High School, title to the premises herein described shall automatically revert tothe "Diocese" without further action on its part.
>
> * * *

> 7. It is understood that "Bishop Ford" [Ford Central] in all respects shall have sole and exclusive responsibility for the operation and maintenance of the school and that whatever debts, obligations, or liabilities, legal or equitable, which are incurred by "Bishop Ford" in the course of said operations and maintenance will be the sole responsibility of "Bishop Ford" and shall not inure, devolve or attach to the "Diocese" in any way. Management and control of the premises shall rest exclusively with "Bishop Ford."

The contract also provided that Respondent Diocese would retain possession of that portion of the premises used in connection with its educational television studio and tower.

An application filed about the same time with the New York State Supreme Court for permission to convey the Bishop Ford property stated:

> That the interest of your petitioner will be promoted by the said conveyance for the reason that the

> above described property was used as a Catholic High School operated by [Hald]. BISHOP FORD CENTRAL ... will operate a Catholic high school in the said premises; upon the cessation of the operation of said high school, title to the said premises shall revert to Petitioner. Petitioner is thereby relieved of the liabilities and obligations attendant upon ownership of the said property while, at the same time, retaining a reversionary interest therein.

The new school began operation on September 1, 1976. Over half of the new faculty had taught at the old school. Neither the Diocese nor Hald had any input in the hiring decisions, and there are no exchanges of personnel between the Diocese or Hald and Ford Central. No services are performed for the new school by the Diocese or Hald. Ford Central makes no use of Respondent Diocese's Catholic Schools Office in hiring new personnel. No reports regarding the operation of the new school are made to the Diocese or Hald. Records

from Bishop Ford High School have been removed from the building, and the Diocese has no access to current records at the new school.

Ford Central has received no funds from Hald or the Diocese. The "grant-in-aid" funds of $65,000, previously made available by the Diocese to the old school, were terminated when the new school began operations. There is no agreement whereby Hald or the Diocese will make up deficits at Ford Central. Initial expenses for Ford Central were paid out of funds of the old school's parents' organizations.

Respondent Ford Central contends that the school is a "church-operated" school within the meaning of Catholic Bishop of Chicago, supra, and that the matter at hand should be dismissed for lack of jurisdiction. We do not agree. We find, on

the basis of the foregoing facts, that Ford Central is not a church-operated school and that Catholic Bishop of Chicago does not apply. In Catholic Bishop of Chicago the schools involved were operated by the Archbishop of Chicago or the Diocese of Ford Wayne-South Bend. Similarly, Bishop Ford High School, the "old" school, was operated by the Diocese of Brooklyn. However, beginning with the 1976-77 school year, Bishop Ford Central Catholic High School operated as a separate institution, governed by an independent, lay board of trustees over whom the Diocese had no control. The Diocese has no representatives on the board; Ford Central hired its own staff and set its own policies with no input from the church. There is no evidence of the Diocese exercising any control or influence over the

operation of this school. As such, it is clearly beyond the definition of a "church-operated" school. Ford Central is an entity separate and distinct from the church. There would be no danger here, in asserting jurisdiction, of entanglement of the government with the church. The Union will be negotiating with an entity which, whatever the religious orientation of its curriculum, is unconnected with the Diocese, over a unit consisting of lay teachers at the school. There is no special church-teacher employment relationship here that the Supreme Court foresaw as possibly leading to serious first amendment questions. We find no impediment to the assertion of jurisdiction over Respondent Ford Central and will reaffirm our original Decision and Order with respect to that Respondent.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby affirms as its Order the Order heretofore entered in this proceeding on May 15, 1978, 236 NLRB No. 3, against Respondent Bishop Ford Central Catholic High School.

IT IS FURTHER ORDERED that the consolidated complaints herein be, and they hereby are, dismissed with respect to Respondents Roman Catholic Diocese of Brooklyn and Henry M. Hald Association.

Dated, Washington, D.C. June 25, 1979

John H. Fanning, Chairman

Howard Jenkins, Jr. Member

John C. Truesdale, Member

(Seal) NATIONAL LABOR RELATIONS BOARD

MEMBER PENELLO, dissenting:

I do not accept by colleagues' narrow reading of Catholic Bishop of Chicago[5/] and the assertion of jurisdiction over Respondent Ford Central. Contrary to my colleagues, I would dismiss the consolidated complaints in their entirety.

In Catholic Bishop of Chicago, the Supreme Court determined that there would be no escape from the consequent serious first amendment questions if the Board exercised jurisdiction over teachers in church-operated schools. Having so found, the Court examined the National Labor Relations Act to decide whether it must be read to confer jurisdiction that would, in turn, require a decision on the aforementioned first amendment issues. An

5/ N.L.R.B. v. The Catholic Bishop of Chicago, supra.

examination of the legislative history of the Act revealed no clear expression of an affirmative intent that teachers in church-operated schools be covered by the Act. The Supreme Court then concluded that "in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."6/

I find that the Board's assertion of jurisdiction over Bishop Ford Central Catholic High School raises the same serious first amendment questions referred

6/ Catholic Bishop of Chicago, 99 S. Ct. at 1322.

to in Catholic Bishop of Chicago, irrespective of the nature of the governing body of Ford Central. The record herein is clear that Ford Central is a religious school with a distinctly sectarian mission and philosophy which permeates all aspects of the school's operations.7/ A sub-

7/ The statement of philosophy found in the faculty and student manuals indicates the schools' religious orientation and mission:

The Philosophy of

Bishop Ford Central Catholic High School

> Bishop Ford Central Catholic High School is a community of persons -- administrators, teachers, students and staff united by their common bond: faith in God as expressed in the Roman Catholic tradition.
>
> The Administrators and teachers recognize the mandate that "The future of humanity lies in the hands of those who are strong enough to provide coming generations with reasons for living and hoping." (The Church Today, 31)

stantial portion of the faculty are members of Roman Catholic regligious orders, as is the principal of the school.[8/] Religion courses are required of all students. A priest chaplain is employed by the school. All faculty members have designated religious responsibilities.[9/]

In accepting this mandate, we work together to assist each student in his striving to become a mature and fulfilled Christian. Through our guidance, instruction and example, we ask that each student imitate Jesus who "advanced in wisdom and age and grace before God and men." (Luke 2:52)

We provide spiratual, educational and social opportunities which coincide with the [threefold] aim of Catholic education as defined in the pastoral, To Teach As Jesus Did.

8/ These religious order members contribute half of their salary to the school.

9/ The faculty manual outlines these religious responsibilities:

RELIGIOUS RESPONSIBILITIES

Students cannot be expected to value a faith commitment or value

The student manual defines religious opportunities and responsibilities for all enrollees.10/ Additionally, the continued relationship of Ford Central to the Diocese

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participation in religious activities if faculty members fail to witness a vibrant interest in a Christian life style.

Each faculty member is expected:

-- to witness Christ like behavior (e.g. attitude, demeanor).
-- to patiently encourage students to foster Christian attitudes.
-- to participate in school liturgies and para-liturgical activities.
-- to encourage, but not FORGE student participation in school liturgies and para-liturgical activities.
-- to cooperate with the priest chaplain and religion department.

10/ It states as follows:

Religious Opportunities and Responsibilities

A student who attends a Catholic school, but fails to participate

of Brooklyn gives me further cause to conclude that there is no more possibility of avoidance of first amendment issues here than in Catholic Bishop of Chicago.[11]

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religiously -- religion class, school liturgies, charitable drives achieves very little. He misses opportunities to build up the kingdom of God, to contribute to the body of Christ and to further develop his friendship with God.

In order that each student religiously matures, he is expected to:

-- behave as a believing Christian (language and actions).
-- participate in school liturgies and other religious activities.
-- take seriously his religion class.
-- co-operate with the priest chaplain.
-- actively participate in helping the needy (food, toy, clothing, etc. drives, tutoring).
-- frequently visit the chapel for prayer and quiet.

11/ The school property was turned over to the Ford Central trustees by the Diocese with the provision that Ford Central con-

Consequently, in accord with the analysis undertaken in Catholic Bishop of Chicago, the Board must look for a clear expression of congressional intent to include these schools in the Board's jurisdiction. Obviously, the Supreme Court's examination of the legislative history in Catholic Bishop of Chicago reveals that no such intent is to be found. In the absence

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tinue to operate a Roman Catholic high school on the premises. The property would revert to the Diocese if such operation ceased. It is the bishop who determines whether a school is a "Catholic school." The Diocese continues to operate its educational television studio and tower on the premises. Furthermore, expert testimony established that, under ecclesiastical law, the bishop of the Diocese retains a general authority over the school, with regard to faith and morals, and could, for example, demand the removal of a teacher who was teaching "something contrary to faith and/or morals."

of the clear expression of congressional intent and in light of the first amendment questions that are raised, we are now prohibited by the Catholic Bishop of Chicago decision from asserting jurisdiction over Ford Central.

Dated, Washington, D.C.
June 25, 1979

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX E

APPENDIX E

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 27th day of April, one thousand nine hundred and seventy-nine.

Present:

HON. STERRY R. WATERMAN

HON. WILFRED FEINBERG

HON. WALTER R. MANSFIELD

Circuit Judges.

HENRY M. HALD HIGH SCHOOL ASSOCIATION, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	78-4074 78-4079 78-4097 78-4098
ROMAN CATHOLIC DIOCESE OF BROOKLYN, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. BISHOP FORD CENTRAL CATHOLIC HIGH SCHOOL, Respondent, and LAY FACULTY ASSOCIATION, LOCAL 1261, Intervenor.	)

ORDER REMANDING CASES TO THE BOARD

Oral argument having been heard today on the stipulation of the National Labor Relations Board, petitioners Henry M. Hald and Roman Catholic Diocese of Brooklyn, and respondent, Bishop Ford Central Catholic High School, to remand the cases to the Board for dismissal, and on the objections of intervenor Lay Faculty Association to a portion thereof, it is hereby

Ordered, that the stipulation to remand for dismissal of the portion of

the cases respecting petitioners Henry M. Hald and Diocese of Brooklyn, be and hereby is, granted.

It is further ordered that the portion of the cases known upon the records of this Court as National Labor Relations Board v. Bishop Ford Central Catholic High School (Nos. 78-4097, 4098) is remanded to the Board for reconsideration of the Board's jurisdiction in light of the National Labor Relations Board v. Catholic Bishop of Chicago, U.S. , 47 LW 4283 (1979). The Board shall conduct this reconsideration on the basis of the record in its Case Nos. 29-CA-4746, 29-CA-4861, 29-CA-5212, 29-CA-5234, and it is the Court's judgment that it is not necessary that the Board receive additional evidence to resolve the issues presented by this remand.

Therefore, it is further ordered that the Board shall commence its reconsideration, which may include oral argument and memoranda of law, of this case promptly, and not later than thirty days from the date of this order, and shall conclude its reconsideration and enter a final order in this matter not later than sixty days from the date hereof.

/s/ Sterry R. Waterman
STERRY R. WATERMAN

/s/ Wilfred Feinberg
WILFRED FEINBERG

/s/ Walter R. Mansfield
WALTER R. MANSFIELD

Circuit Judges

APPENDIX F

APPENDIX F

236 NLRB No. 3 D-3737
Brooklyn, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROMAN CATHOLIC DIOCESE OF BROOKLYN, HENRY M. HALD ASSOCIATION, BISHOP FORD CENTRAL CATHOLIC HIGH SCHOOL

and

LAY FACULTY ASSOCIATION, LOCAL 1261, AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Cases 29-CA-4746, 29-CA-4861, 29-CA-5212, and 29-CA-5234

DECISION AND ORDER

On July 28, 1977, Administrative Law Judge Frank H. Itkin issued the attached Decision in this proceeding. Thereafter, all parties filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge, to modify his remedy so that interest is to be computed in the manner prescribed in Florida Steel Corporation,

1/ Respondent Roman Catholic Diocese of Brooklyn, Charging Party, and General Counsel excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

231 NLRB No. 117 (1977),[3] and to adopt his recommended Order,[4] as modified herein.

2/ Respondent Bishop Ford Central Catholic High School excepted to the Administrative Law Judge's finding that a unit of all full-time permanent lay teachers is appropriate for purposes of collective bargaining. While we agree that such a unit is appropriate, we do so for reasons other than those offered by the Administrative Law Judge. The record establishes a significant history of collective bargaining between the Union and the predecessor employer. In 1966, the Roman Catholic Diocese of Brooklyn began bargaining with the Union for a unit consisting primarily of lay teachers. The parties negotiated a series of collective-bargaining agreements, the last of which was in effect at the time of the transfer of the high school to its new operators in 1976. Furthermore, "There is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit, the Act requires only that the unit be 'appropriate'." Morand Brothers Beverage Co., 91 NLRB 409, 418 (1950), enfd. 190 F.2d 576 (C.A. 7, 1951). Thus, we find that the unit of lay teachers described herein is an appropriate unit for purposes of collective bargaining. St. Joseph Hospital & Medical Center, et al., 219 NLRB

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts

2/ (continued) 892 (1975); Continental Can Co., 217 NLRB 316 (1975); Columbia Broadcasting System, Inc., 214 NLRB 637 (1974).

Contrary to the Administrative Law Judge, we find that Respondent, Ford Central Catholic High School, became a successor employer and was obligated to bargain with the Union in the unit of all full-time permanent lay teachers as of August 27, 1976, when said Respondent made its final decision on hiring.

3/ See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

4/ The Administrative Law Judge recommended that in order to remedy the failure of Respondents Roman Catholic Diocese of Brooklyn and Henry M. Hald Association to bargain with the Union over the decision to close the school and over the effects of that decision, the aforementioned Respondents be required to bargain with the Union and pay backpay in the manner prescribed in Van's Packing Plant, 211 NLRB 692 (1974). However, we would require Respondents to bargain with the Union over the effects of the decision and to make whole the terminated employees by the payment of backpay with interest from the date of the termination to the date they commence to

as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that Respondent Bishop Ford Central Catholic High School, Brooklyn, New York, its officers, agents,

4/ (continued) bargain in good faith with the Union or until the employees are offered reinstatement, whichever occurs first, less net earnings during such period, and computed in the manner prescribed in F. W. Woolworth Company, 90 NLRB 289 (1950), and Florida Steel Corporation, supra; (See, generally, Isis Plumbing & Heating Co., supra); Brockway Motor Trucks,230 NLRB No. 147 (1977); Metro Transportation Services Company, Inc., 218 NLRB 534 (1975). (Chairman Fanning would continue the backpay obligation until such time as the Respondent has complied with its obligation to bargain.) Unlike the respondent in Van's Packing Plant, Respondents here did not completely eliminate the unit and thereby terminate the bargaining relationship with the Union. Instead, Respondents unilaterally closed part of their operation and terminated a number of unit employees at the end of the school year, while continuing to operate the four remaining schools. See Pine Valley Division of Ethan Allen, Inc., 218 NLRB 208 (1975).

successors, and assigns, shall take the action set forth in said recommended Order of the Administrative Law Judge and that Respondent Roman Catholic Diocese of Brooklyn and Henry M. Hald Association, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Make whole the employees of Bishop Ford High School in the appropriate unit by payment of backpay from the date of their termination to the date Respondent bargains in good faith with the Union or until such employees are offered reinstatement by Respondent, whichever occurs first."

2. Substitute the attached "Appendix

A" for that of the Administrative Law Judge.

Dated, Washington, D.C. May 15, 1978

John H. Fanning, Chairman

John A. Penello, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX G

Statutes Involved

The relevant portions of the National Labor Relations Act, as amended (29 U.S.C. §151 et seq.), are as follows:

> Sec. 2 (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.
>
> * * *
>
> Sec. 7 Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a

labor organization as a condition of employment as authorized in section 8(a)(3).

* * *

Sec. 8(a) It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment of any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, (i) if such labor organization is the representative of the employees as provided in section 9(a) in the appropriate collective-bargaining unit covered by such agreement when

made and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

Sec. 9(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

* * *

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.

* * *

(e) The Board shall have power to petition any court of appeals of the United States *** within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its members, agent, or agency, shall be considered by the court,

unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The finding of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive ***

Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business or in the United States Court of Appeals for the District

of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.